IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.7149 OF 2004

Yeshwant Rambhau Chondhe
since deceased through his
legal heirs & Ors.
Tanaji Yeshwant Chondhe
and Ors. .. Petitioners.
(Orig.Plaintiffs)

Versus

Vilas Bapurao Shinde
since deceased, through his
legal heirs
Vijaya Vilas Shinde & Ors. .. Respondents.
(Orig.Defendants)

Shri.S.M.Gorwadkar for petitioners.
Shri.V.B.Naik for respondents 1 to 7, 9 and 10.
(Respondents 11 to 25 deleted as per Court's order dated 6th June, 2007).

CORAM : R.M. SAVANT, J.
DATE OF JUDGEMENT RESERVED ON : 06.06.2007.
DATE OF JUDGEMENT PRONOUNCED ON : 28.06.2007.

JUDGEMENT : -

1. Rule. By consent of parties made returnable forthwith and heard.

2. This petition filed under Article 227 of the Constitution of India raises an issue as to whether the petitioners herein, who are the original plaintiffs should be allowed to lead

secondary evidence. The said issue arises in the context of the decision of the Trial Court who refused to exhibit the certified copies of the registered documents by rejecting the application of the petitioners-plaintiffs marked as Exhibit-1 vide the impugned order dated 22nd July, 2004.

3. The factual matrix involved in the present petition is stated thus :-

a. The petitioners-plaintiffs and the respondents 18 to 25 herein have filed R.C.S. No.1075 of 1996 in the Court of the Civil Judge, Junior Division, Pune claiming specific performance of the Agreements for sale dated 30th July, 1956 and 18th July, 1957 against the respondents 1 to 17 herein.

b. The suit property is survey No.12 and survey No.171/4 admeasuring about 9

acres and 1 guntha at village Aundh, Taluka and District Pune. The ancestor of the petitioners-plaintiffs late Rambhau Haribhau Chondhe was the tenant in the said land.

c. By the registered agreements between Rambhau Haribhau Chondhe and the owners, namely, deceased Bhikoba, deceased Vilas Bapurao Shinde with Ashok and Sambhaji agreed to sell the said property to the petitioners-plaintiffs. It was agreed that the said late Rambhau Haribhau Chondhe would surrender his tenancy rights for effecting the sale.

d. The possession of the suit property was to be given to the petitioners-plaintiffs by the said deceased Rambhau and confirmed by the deceased Bhikoba Shinde and Vilas Shinde

with Ashok Shinde and Sambhaji Shinde. Since the petitioners-plaintiffs are in continuous possession of the same.

e. The respondents 1 to 3 are the legal heirs of the deceased Tarabai while respondents 4 to 10 are the legal heirs of the deceased Bhikoba.

f. It was agreed between the parties that the conveyance would be executed after the final settlement of the dispute with one Chunilal Lacchiram Khivsara and also with Yeshwant Ganpat Gaikwad in Civil Suit No.1254 of 1955. The respondents 1 to 10 herein had agreed to make the title clear and marketable. Since the Civil Suit No.1254 of 1955 was decided finally on 11.10.1995, the petitioners-plaintiffs approached the defendants for execution of the

Conveyance of the suit property but the defendants 1 to 10 avoided to perform their part of the contract. The petitioners-plaintiffs, therefore, were constrained to file R.C.S.No.1075 of 1996 on 16.07.1996 for specific performance of the said contract. In the said suit in the list of documents, a mention of the agreements dated 30.07.1956 and 18.07.1957 finds a place, as the documents on which the petitioners-plaintiffs would rely. However, there is no averment in the plaint as regards whether the petitioners-plaintiffs are in possession of the said documents or as to who is in the possession of the said documents.

g. On behalf of the petitioners-plaintiffs, the petitioner No.1(a) herein filed his affidavit of

examination-in-chief on 13.11.2003 and also filed certified copies of the registered agreements of sale dated 30.07.1956 and 16.07.1957 with list of documents, which was numbered as Exhibit-177. The contesting defendants i.e. respondents 1 to 10 herein filed an application at Exhibit-179 and prayed that the said certified copies of the registered Agreements of Sale dated 30.07.1956 and 16.07.1957 may not be exhibited.

h. The petitioners-plaintiffs filed their say to the said Exhibit-179, which was marked as Exhibit-182 and pointed out that the affidavit of evidence indicates that the originals of the said documents are missing and are not traceable and, therefore, it was essential to lead secondary evidence of the said documents.

The learned Civil Judge, Junior Division by order dated 02.01.2004 allowed Exhibit-179 i.e objection of the defendants for exhibiting the said documents and observed that it was necessary for the petitioners-plaintiffs to file an application for permission to lead secondary evidence and to lay foundation for the same. Since the said Exhibit-179 was not supported by any application for leading the secondary evidence, the learned Judge held that the documents could not be exhibited.

i. The petitioners-plaintiffs, in view of the order passed on Exhibit-179 dated 02.01.2004, therefore, filed an application that the said documents produced with Exhibit-177 are the certified copies of the agreements dated 30.07.1956 and 18.07.1957 and the same

were furnished by the office of the Sub Registrar where the originals of the said agreements had been presented for registration. The petitioners-plaintiffs after mentioning about the execution of the said documents have stated that in the affidavit containing the examination-in-chief of Shri.Tanaji Yeshwant Chondhe dated 20.11.2003 in Para 13, it has been specifically stated and affirmed that the original documents are not traceable and even could not be traced in the office of the Sub Registrar, Haveli No.2 or the same could not be traced in the belongings of the late Yeshwant Chondhe, the father of the affiant Shri.Tanaji Chondhe. The petitioners-plaintiffs further stated in the said application that the said original documents are lost and are not available for being produced in the

proceedings and, therefore, the secondary evidence alongwith Exhibit-177 at Sr.No.1 and 2 by way of certified copies of the same are produced and the same are, therefore, required to be admitted as the evidence in the present proceedings. The petitioners-plaintiffs, therefore, prayed that the petitioners-plaintiffs should be granted the necessary permission to lead evidence by way of secondary evidence in relation to the said documents.

j. To the said application of the petitioners-plaintiffs, a reply was filed by the contesting defendant Nos.1 to 3 and 7, who are the respondents in the present petition. The sum and substance of the reply was that the said application was not maintainable in view of the order passed on Exhibit-179 dated 02.01.2004. The defendants further

contended that leading evidence in the absence of pleadings was impermissible.

k. The said application of the petitioners-plaintiffs was considered and the Trial Court vide its order dated 02.01.2004 rejected the said application principally on the ground that in view of the order passed on Exhibit-179, the aforesaid application without there being any foundation was not maintainable. Insofar as the point of res-judicata was concerned, the Trial Court did not accept the said submission of the defendants as according to it, the plea of res-judicata was not available at the said juncture.

l. The petitioners-plaintiffs thereafter filed an additional affidavit of Shri.Tanaji Yeshwant Chondhe seemingly in compliance of the orders passed on

Exhibit-179 and Exhibit-185. In the said affidavit, the case of loss of the said documents was interalia stated. On the basis of which, a foundation was sought to be laid for leading secondary evidence. The said affidavit was numbered as Exhibit-204 and the prayer of the petitioners-plaintiffs numbered as Exhibit-1. The said application of the petitioners-plaintiffs came to be rejected by the Trial Court on the ground of res-judicata as also on the ground that no case in terms of Section 65 of the Evidence Act and the law laid down by this Court as well as Apex Court in the matter of laying foundation for leading evidence was made out by the petitioners-plaintiffs. It is against the said order dated 22.07.2004 passed by the learned Joint Civil Judge, Junior Division, Pune that the instant petition

is filed.

4. I have heard the learned counsel for the petitioners-plaintiffs Shri.Gorwadkar and the learned counsel for the contesting respondents Shri.V.B.Naik.

5. It is the contention of Shri.Gorwadkar while assailing the said order of the Trial Court refusing permission to exhibit the certified copies of the documents and thereby refusing the petitioners-plaintiffs permission to lead secondary evidence that if the originals are not produced, the petitioners-plaintiffs have every right to produce the certified copies of the same and they have to be accepted and the permission of the Court is not at all necessary. It was further contended by Shri.Gorwadkar that the orders passed on Exhibit-179 dated 02.01.2004 and the order passed on Exhibit-185 dated 22.07.2004 cannot operate as res-judicata as by the said

orders, the trial Court had directed the plaintiffs to follow a particular course of action in the matter of laying foundation for leading secondary evidence. Having laid the foundation by filing the affidavit Exhibit-204, the petitioners-plaintiffs are entitled to lead the secondary evidence and the Court cannot refuse the said permission. In any event, according to Shri.Gorwadkar, the procedure prescribed cannot be used as a shield to deprive the plaintiffs from relying upon the secondary evidence as ultimately procedure is only the handmaiden of justice and the Court with a view to do substantial justice can permit the petitioners to lead secondary evidence.

6. Shri.Gorwadkar further submitted that once certified copies are produced of the originals, they are admissible in evidence. Shri.Gorwadkar principally relied upon the judgement reported in **AIR 1990 S.C. Pg.396** in

the matter of **Kalyan Singh v/s.Chhoti & Ors.** Paragraph 25 of the said judgement on which reliance is placed by Shri.Gorwadkar is reproduced hereunder : -

> "25. The High Court said, and in our opinion very rightly, that Ex.3 could not be regarded as secondary evidence. Section 63 of the Evidence Act mentions five kinds of secondary evidence. Clauses (1), (2) and (3) refer to copies of documents; clause (4) refers to counterparts of documents and clause (5) refers to oral accounts of the contents of documents. correctness of certified copies referred to in clause (1) is presumed under Section 79; but that of other copies must be proved by proper evidence. A certified copy of a registered sale deed may be produced a secondary evidence in the absence of the original. But in the present case Ex.3 is not certified copy. It is just an ordinary copy. There is also no evidence regarding content of the original sale deed. Ex.3 cannot therefore, be considered as secondary evidence. The appellate Court has a right an duty to exclude such evidence."

7. Shri.Gorwadkar also relied upon the following judgements : -

1) **AIR 1991 AP Pg.31** in which it has been held

that a certified copy can be treated as secondary evidence.

2) **AIR 1945 Bombay Pg.319 & AIR 1956 Bombay Pg.65** in which judgements, it has been held that certified copies prima-facie prove the execution of documents; And

3) **2000 (I) S.C.C. Pg.434**, which is a judgement of the Apex Court in the matter of **Ishwar Dass Jain v/s. Sohan Lal,** the sum and substance of the said judgement as indicated above is that certified copies of the originals are admissible as secondary evidence.

8. Relying upon the said judgements, Shri.Gorwadkar submitted that once certified copies are produced, the Court had to accept them as secondary evidence.

9. On behalf of the contesting respondents

i.e. the original contesting defendants to the said suit, Shri.V.B.Naik, the learned counsel submitted that the application made by the petitioners-plaintiffs by filing an affidavit Exhibit-204 was not maintainable in view of the orders passed on Exhibit-179 and Exhibit-185. The orders passed on the said exhibits, according to Shri.Naik operate as res-judicata as they have become final in the absence of any challenge to them. Shri.Naik submitted that merely because certified copies were produced the same per se were not admissible as evidence unless the procedure prescribed for the same was satisfied.

10. Shri.Naik further submitted that to lead secondary evidence, a foundation has to be laid in the pleadings and the same must be at the earliest opportunity. In the instant case, admittedly, there is no whisper in the plaint about the loss of the said documents or as to in whose custody they were. It was further

submitted by Shri.Naik that in the absence of any pleadings, no evidence can be allowed to be led. Shri.Naik drew my attention to the affidavit of examination-in-chief of the plaintiff No.1(a) in which affidavit also, there is no mention about the loss of the said documents or as to why the certified copies were produced vide Exhibit-177. Hence, according to Shri.Naik, unless permitted by the Court, the petitioners i.e. the plaintiffs herein cannot file additional affidavit of evidence as the same amounts to recalling of a witness. Shri.Naik relying upon the sequence of events submitted that the case made out by the petitioners does not deserve acceptance. Shri.Naik submitted that the instant suit was filed in the year 1996 and the plaintiff No.1(a) as per his own deposition became aware of the loss of the said documents in the year 1985 and still there is no whisper in the plaint filed in the year 1996. Shri.Naik further submitted that it is nowhere stated by the plaintiffs as to

what efforts were made by them to trace the documents and as to whose custody they were in.

11. Shri.Naik submitted that the evidence of the plaintiff, who is a practicing Advocate and the evidence of Shri.S.L.Gaikwad from the Sub Registrar office does not inspire confidence and, therefore, the Trial Court, according to Shri.Naik has rightly rejected the application of the plaintiffs for leading secondary evidence of the original documents. Shri.Naik relying upon the judgement reported in **AIR 1966 S.C. Pg.1457** submitted that a foundation has to be laid for leading secondary evidence and unless such foundation is laid, it is impermissible for a party to be permitted to lead secondary evidence. Shri.Naik relied upon paragraph 8 of the said judgement. The said paragraph is reproduced hereunder : -

> "(8): As there is no document recording the grant of inam and its conditions, one has to turn to a number of documents from

which the High court and the court below have drawn opposite conclusions regarding what was included in the inams. There is, of course, no dispute that the inam must have comprised the melwaram at least. That must have been done in any event. Thus the sole question is whether it comprised the kudiwaram also. In reaching the conclusion that both warams were included, the District Judge took into consideration certified copies of certain leases from the record of an old case O.S.No.124 of 1944 of the Court of Subordinate Judge, madurai. These documents are Exts. B-4, 5, 6 and A-68, 69 and 77. Ex.B-4 is a karalnama (agreement) executed for the fasli years 1348 and 1349 by which the lessees undertook to hand over 1/3 share of the produce as melwaram and to retain 2/3 share as kudiwaram from the lands leased out of Keelapappapathu. Ex.B-5 is another lease for cultivating the whole of Keelapappapathu nanja (wet) lands. Ex.B-6 is a muchilika in respect of nanja lands in Keelapappapathu by which lessee undertook to pay half produce as melwaram and to retain the other half as kudiwaram. These documents undoubtedly would have thrown light upon the matter but they were not admissible because they were only copies. The originals were not produced at any time nor was any foundation laid for the establishment of the right to give secondary evidence. The High Court rejected them and it was plainly right in so deciding. If we leave these documents out of consideration, the other documents do not show that the inam comprised the kudiwaram also. Ex. A-3 is an extract from the village account of Managiri

village, Manlakulam Taluk relating to inams. It is for the years 1802-1803. The lands are sufficiently identified with the suit lands by the area. The lands were described as Stalathar inam Porupa manyam, conducted for Meenakshi Sunderashwaral temple. the poruppu being a low or quit rent according to the 5th Report, p.765 we get an indication as to what the inams comprise. The account shows that from the total assessment of 96 Pons O fanoms and 15 thuddsu, the poruppu was only 19 Pons. 2 fanoms and 3 thuddsu. Again in Ex.A-5, which is an extract of the Inam Account of Manigiri village of 1217 fasli i.e. five years later, the heading was Inam Enquiry Mauje (village) Manigiri. Now the word Mauje is used in respect of villages in which there are cultivators owning cultivable lands. This has been so held for a long time. (See Venkata Sastrulu v. Devi Sitaramadu, ILR 38 Mad 981: (AIR 1015 Mad 727), per Sadasiva Iyer, J. and Seethayya v. Subramanya Somayajulu, ILR 52 Mad 453 at p.463 : (AIR 1929 PC 115 at p.118). In the remarks column, the poruppu amount payable is stated and it almost corresponds to the poruppu earlier mentioned, and there is a further mention of the service of the temple. The pattas exhibits A-6 to A-8 of the years 1856, 1857 and 1860 also speak of sourandayam manibam poruppu which is revenue payable in money at a concession. The inamdars did not themselves claim in the Inam enquiry anything more than the melwaram rights and in Exts.A-10 and A-11, which are the Inam statements (1862) and the Inam Fair Register dated September 25, 1863, the Stalathar Poruppu manibam is again mentioned and the Inams were

> registered in the names of Bhattars as the Sthaniks of the temple."

12. Shri.Naik also relied upon the judgement reported in **AIR 1959 A.P. Pg.568 in the case of Smt.Bobba Suramma v/s. Smt.Peddireddi Chandramma,** which interalia held that credible evidence has to be laid for the loss of the original. Paragraphs 19 and 20 of the said judgement are relevant and are reproduced hereunder : -

> "(19): There is another obstacle to the appellant taking advantage of the provisions of Section 65 of the Indian Evidence Act. Secondary evidence can be let in under Section 65 only in certain circumstances one of which is that when the original has been destroyed or lost. The case of the appellant is that it was lost. In support of that case, we have only the evidence of D.W.3. He does not really advance the case of the appellant in any manner on that issue. This is what he deposed in his chief examination :-
>
> > "Inukonda Devarakonda Suramma executed a sale-deed in favour of Padmanabham which was used in the prior litigation. It is not be found now, it seems to have been lost. I do not know what

happened to it."

In the cross examination, he admitted that he had never seen the sale deed but that one Ammanna told him that he had seen it. Ammanna, although he is alive, was not examined by the appellant. The statement of D.W.3 that the sale deed executed by Devarakonda Suramma was used in a prior litigation does not seem to be entitled to much weight, in view of his admission that it was Ammanna that was looking into the affairs of Atchamma, the adoptive mother of the fourth defendant, in the prior litigation, namely, O.S.No.210 of 1941. Could this be regarded as sufficient material on which the case of destruction or loss of a document could be based? For one thing, D.W.3 does not know anything about that document.

He was only told by someone that he had seen it. How then could he prove its loss the existence of which he had no knowledge? Moreover, he does not definitely speak to the loss of the document. All that he stated was that it was not found by him and therefore it seemed to have been lost. There is not even a whisper of his having conducted a search for it and was unable to trace it. The recitals in the written statement in that regard are significant. This is what is stated in paragraph 4 of the written statement :-

> "The whole record relating to the said land was lost at the time of the death of this defendant's adoptive father and mother. Now, after some investigation and with

> great difficulty the certified copies were obtained and being filed."

At the outset, it should be remembered that no copy of the alleged sale deed was filed before the Court. Therefore, the loss of the record referred to in the written statement could have reference only to documents for which copies were filed into Court. Again, the statement is as vague as it could be. It is not shown as to when exactly the records were lost. It could not be ignored in this contest that there was a long interval between the death of the adoptive father and that of the adoptive mother of the fourth defendant.

(20) : In order to claim the benefits of section 65 of the Indian Evidence Act, there should be credible evidence of the loss of the original. As pointed out by one of us in Ananta Raghuram v. Raja Bommadevara, AIR 1958 Andh Pra 418 at p.421 (Srinivasachari, J.)

> "There must be sufficient proof of the search for the original to render secondary evidence admissible. It must be established that the party has exhausted all the sources and means in the search of the document which were available to him."

There is utter paucity of evidence on record in this case. As already stated, excepting the statement of D.W.3 extracted above, there is nothing else in the direction of the proof of the loss of

> the document. In this connection, we cannot also overlook the fact that the parties had preserved Ex.B-1 of the year 1915, and there is no satisfactory explanation as to how this document was missing and under what circumstances it was lost. The only reasonable inference that could be drawn is that there was no such document, or, even if one existed, it was not produced, probably for the reason that it might be unfavourable to the party.
>
> The District Munsif had contended himself by saying that evidently this document was lost. This is again based on a surmise that there must have been some document executed in 1934 and, if it was not produced, it must have been destroyed or lost. This in our opinion, is not a sustainable conclusion. Both the Courts below had not devoted any attention to this aspect of the case, obviously for the reason that they were not extending the benefits of Section 53-A to the contesting defendant."

13. Shri.Naik also relied upon the judgement reported in **AIR 1966 Culcutta Page 13 in the case of Biswanath Agarwalla v/s. Smt.Dhapu Debi Jajodia and Ors.** Paragraph 48 of the said judgement on which reliance is placed is reproduced hereunder : -

> "(48): Once it is held that Munia never

executed the document the question of the plaintiffs calling upon Dhapu to produce the original and tendering a certified copy of it under the provisions of Section 65 of the Evidence Act is ruled out. but even if I were to come to the conclusion that Munia had executed the deed of adoption I would still hold that the case had not been made out for adducing secondary evidence of it. Under Section 61(2) of the Registration Act upon the registration of the document it shall be returned to the person who presented the same for registration or to such other person (if any) as he has nominated in writing in that behalf on the receipt mentioned in Section 52. There is no evidence as to when if ever Munia obtained the document from the Registration Office at Nawa. but assuming that she took the document from the Registration Office there is no reliable evidence to show that Dhapu had obtained possession of it afterwards. (His Lordship referred to evidence on this point and proceeded). On the evidence adduced the learned trial Judge held that the document was not in the possession of the plaintiff but he did not record a finding as to whether Dhapur was in possession of it and concluded that it was enough for the plaintiff to prove that so far as he was concerned the document was lost. I find myself unable to hold that this is a case where the document can be held to have been lost. To record a finding that the document is lost it must be established that a thorough search had been made in places where it was likely to be found and of persons likely to have possession of the same. There is no evidence of any search

> and indeed the only reference to its whereabouts prior to the institution of the suit is the letter of Mr.Bagla to Mr.Bagaria solicitors for Dhapu that his client had suppressed it."

14. Shri.Naik further placed reliance upon the judgement reported in **AIR 1986 Calcutta Pg.430 in the case of Smt.Sulochana Devi Bubna v/s. Gobinda Chandra Nag and Ors.** Paragraph 16 of the said judgement is reproduced hereinunder :-

> "16. Then, we come to another piece of evidence (Ext.1), the deed of lease. Admittedly, the original of the same was not appropriately proved but a copy was sought to be tendered and there is no statement about due searches, which were required to be made by the plaintiffs. That being the position and since there had been no explanation about such and due searches. Agreeing with Mr.Roy Choudhary, we feel and observe that under S.65(c) of the Evidence Act, the same was also appropriately taken into evidence. In support of the submissions as above, Mr.Roy Choudhary, firstly referred to the case of Smt.Bobba Suramma v. Smt.Peddireddi Chandramma, AIR 1959 Andh Pra 568, where it has been observed that secondary evidence can be led in under S.65, only in certain circumstances, one of which is that when the original has been destroyed or lost, apart from

observing that in order to claim the benefits of S.65, there should be credible evidence of the loss of the original and there must be sufficient proof of the search for the original, to render secondary evidence admissible and thus, it may be established that the party has exhausted all the sources and means in the search of the documents which were available to him. While on the point, Mr.Roy Choudhary also had secondly, placed reliance on the observations in the case of Biswanath Agarwalla v. Smt.Dhapu Debi Jajodia, AIR 1966 Cal 13, where also, this Court has specifically laid down, while dealing with the question of loss of document and necessary proof thereof, that to record a finding that the document is lost and to enable a party to produce a certified copy thereof, it must be established that a thorough search had been made in places where it was likely to be found and of persons likely to have possession of the same. In this case, admittedly there was paucity of such evidence, as was necessary for the purpose of having the copies of the concerned documents tendered in evidence and that being the position, we feel that the copy of the deed which was marked as Exhibit 1, was also improper. We further feel that even if, in the fact and circumstances of the case, the parties before the learned Court below had not taken appropriate steps, the learned Court was also required or obliged in law to see at least that the exhibits, the particulars whereof have been indicated hereinbefore, were duly tendered and accepted in evidence and it is our view that the Court below has failed to discharge such

obligation in the instant case."

15. Shri.Naik lastly relied upon the recent judgement of the Apex Court on the issue of the foundation to be laid for leading secondary evidence, the said judgement is in the matter of **Smt.J.Yashoba v/s. Smt.K.Shobha Rani in S.L.P. (C) No.12625 of 2005 dated 19.04.2007.** The relevant part is reproduced hereunder :-

> "The rule which is the most universal, namely that the best evidence the nature of the case will admit shall be produced, decides this objection that rule only means that, so long as the higher or superior evidence is within your possession or may be reached by you, you shall give no inferior proof in relation to it. Section 65 deals with the proof of the contents of the documents tendered in evidence. In order to enable a party to produce secondary evidence it is necessary for the party to prove existence and execution of the original document. Under Section 64, documents are to be provided by primary evidence. **Section 65, however permits secondary evidence to be given of the existence, condition or contents of documents under the circumstances mentioned. The conditions laid down in the said Section must be fulfilled before secondary evidence can be admitted. Secondary evidence of the contents of a document cannot be admitted without non-production of the original being first accounted for**

in such a manner as to bring it within one or other of the cases provided for in the Section. In Ashok Dulichand v. Madahavlal Dube and Another [1975(4) SCC 664], it was interalia held as follows :-

> "After hearing the learned counsel for the parties, we are of the opinion that the order of the High Court in this respect calls for no interference. According to clause (a) of Section 65 of Indian Evidence Act, Secondary evidence may be given of the existence, condition or contents of a document when the original is shown or appears to be in possession or power of the person against whom the document is sought to be proved or of any person out of reach of, or not subject to, the process of the Court of any person legally bound to produce it, and when, after the notice mentioned in Section 66 such person does not produce it.
>
> Clauses (b) to (g) of Section 65 specify some other contingencies wherein secondary evidence relating to a document may be given, but we are not concerned with those clauses as it is the common case of the parties that the present case is not covered by those clauses. In order to bring his case within the purview of clause (a) of Section 65, the appellant filed applications on July 4, 1973, before respondent No.1 was examined as a witness,

praying that the said respondent be ordered to produce the original manuscript of which, according to the appellant, he had filed Photostat copy. Prayer was also made by the appellant that in case respondent No.1 denied that the said manuscript had been written by him, the photostat copy might be got examined from a handwriting expert. The appellant also filed affidavit in support of his applications. It was however, nowhere stated in the affidavit that the original document of which the photostat copy had been filed by the appellant was in the possession of Respondent No.1. There was also no other material on the record to indicate the original document was in the possession of respondent No.1. The appellant further failed to explain as to what were the circumstances under which the photostat copy was prepared and who was in possession of the original document at the time its photograph was taken. Respondent No.1 in his affidavit denied being in possession appeared to the High Court to be not above suspicion. In view of all the circumstances, the High Court to be not above suspicion. In view of all the circumstances, the High Court came to the conclusion that no foundation had been laid by the appellant for leading secondary evidence in the shape of the photostat copy. We find

> no infirmity in the above order of the High Court as might justify interference by this Court."

. The said judgements interalia lay down a proposition that if original of the documents is not produced but copy thereof is tendered,the party producing it has to give credible explanation by way of evidence of the efforts made about to trace the original.This would be an aspect of the foundation being laid for not producing the original and producing the certified copies thereof.

16. I have bestowed my anxious consideration to the rival contentions. It will have to be borne in mind that the decision whether to allow or not to allow secondary evidence would have a far reaching consequence for either of the parties in the said suit. It would, therefore, be relevant to reproduce Section 63 and 65 of The Indian Evidence Act, 1872.

"63. Secondary evidence :- Secondary evidence means and includes -

(1) Certified copies given under the provisions hereinafter contained;

(2) Copies made from the original by mechanical processes which in themselves insure the accuracy of the copy, and copies compared with such copies;

(3) Copies made from or compared with the original;

(4) Counterparts of documents as against the parties who did not execute them;

(5) Oral accounts of the contents of a document given by some person who has himself seen it.

65. Cases in which secondary evidence relating to documents may be given :- Secondary evidence may be given of the existence, condition, or contents of a document in the following cases :-

(a) When the original is shown or appears to be in the possession or power - of the person against whom the document is sought to be proved, or of any person out of reach of, or not subject to, the process of the Court, or of any person legally bound to produce it, and when, after the notice mentioned in section 66, such person does not produce it;

(b) when the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his

representative in interest;

(c) when the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time;

(d) when the original is of such a nature as not to be easily movable;

(e) when the original is a public document within the meaning of section 74;

(f) when the original is a document of which a certified copy is permitted by this Act, or by any other law in force in [India] to be given in evidence;

(g) when the originals consists of numerous accounts or other documents which cannot conveniently be examined in Court, and the fact to be proved is the general result of the whole collection.

In cases (a), (c) and (d), any secondary evidence of the contents of the document is admissible.

In case (b), the written admission is admissible.

In case (e) or (f), a certified copy of the document, but no other kind of secondary evidence, is admissible.

In case (g), evidence may be given as to the general result of the documents by any person who has examined them, and who is skilled in the examination of such

documents."

17. A reading of Section 63 makes it clear as to what is secondary evidence. Section 65 postulates when secondary evidence is admissible. Clause "c" thereof is applicable in the instant case as it is the case of the petitioners that the originals have been lost. In view of the law cited (supra) dealing with the issue as to when secondary evidence can be allowed to be led which has been relied upon by the learned counsel Shri.Naik; what emerges is that secondary evidence can be allowed to be led only when there is a foundation laid by the party concerned for leading it. Since it is the case of the petitioners-plaintiffs that the said documents have been lost, in view thereof, the other parameters as to what efforts were made by the plaintiffs to trace the said documents would also be attracted. The plaintiffs case would, therefore, have to be considered in the light of the said parameters, which have been laid down by

the Apex Court as well as from the principles which can be culled out from the judgements cited by Shri.Naik. Before going to the said aspect, it would be necessary to see as to whether the application of the plaintiffs is hit by the principles of res-judicata or principles of analogous thereto.

18. The petitioners herein had produced the certified copies of the two documents vide Exhibit-177 and sought exhibition of the said documents in the said suit. The said prayer of the petitioners was opposed by the respondents herein, who are the defendants by application Exhibit-179. The said application Exhibit-179 of the defendants came to be allowed and consequently the said documents were not exhibited. This is the first order which operates against the petitioners-plaintiffs. The petitioners thereafter, moved an application which was marked as Exhibit-185 for leading

secondary evidence. The said application also came to be rejected as the Trial Court was of the view that without complying with the directions contained in the order passed on Exhibit-179, the said application Exhibit-185 came to be moved by the plaintiffs. The Trial Court, however, while rejecting the said application observed that the case of the contesting respondents herein that res-judicata was applicable could not be a countenanced at the said stage. Therefore, the order passed on Exhibit-185 is the second order which operates against the plaintiffs. It is significant to note that the plaintiffs have not challenged the said order on Exhibit-179 and the order passed on Exhibit-185. The said orders, therefore, have become final insofar as exhibiting the said certified copies is concerned. The plaintiffs thereafter have filed an additional affidavit of the plaintiff No.1(a) by which the foundation was sought to be laid for leading secondary evidence by them. The Trial

Court vide its order passed on the said application Exhibit-1 has come to a conclusion that the principles of res-judicata are attracted and, therefore, the said Exhibit-1 filed by the petitioners-plaintiffs was not maintainable. The Trial Court was of the view that unless the orders on Exhibit-179 and Exhibit-185 were set aside, the application Exhibit-1 was not maintainable. In my view, no fault can be found with the said reasoning of the Trial Court. The proper course for the petitioners-plaintiffs would have been to challenge the said orders passed on Exhibit-179 and Exhibit-185 and seek permission of the Court to lay a foundation for leading secondary evidence. Having not challenged the said orders passed on Exhibit-179 and Exhibit-185, in my view, the petitioners-plaintiffs were not entitled to file a fresh application. If the course adopted by the plaintiffs is to be accepted, it would lead to chaos as there would be conflicting orders on

record in a proceeding. Therefore, as indicated hereinabove, the order passed by the Trial Court, taking into consideration the said aspect, cannot be faulted with.

19. The Trial Court notwithstanding the rejection of the said application Exhibit-1 on the ground of res-judicata also considered the petitioners-plaintiffs case on the touchstone of Section 65(c) of the Evidence Act. In my view, the approach of the Trial Court was right as ultimately it would have to be seen whether substantial justice has been done or not. It would, therefore, be necessary to consider as to whether any foundation has been laid by the petitioners-plaintiffs for leading secondary evidence as held in the judgements cited by Shri.Naik.

20. In the instant case, it is an admitted position that there is not a whisper or word

about the said documents being lost or were not in the possession of the original plaintiffs. It is pertinent to note that the suit is filed in the year 1996 and as per the evidence of the plaintiffs, especially plaintiff No.1(a), he became aware of the loss of the said documents in the year 1985 and still there is no whisper in the original pleadings and, therefore, insofar as the original pleadings are concerned, there is no foundation laid therein.

21. The petitioners-plaintiffs have tried to substantiate their case for leading secondary evidence by filing an additional affidavit of plaintiff No.1(a) Shri.Tanaji Yeshwant Chondhe, who has been cross examined by the respondents herein. From the aspect as to whether foundation has been laid or not, the part of the deposition from the cross examination which is relevant, reads as follows : -

"It is my imagination that those document

> must have been lost during postal transit. I did not enquire to the registrar in which post office those document were dispatched for delivery to customer concerned. I did not enquire in writing from the postal department about non-receipt of these documents dated 30.07.1956 and 18.07.1957. at anytime. On page 61 he further admitted that, "before institution of particular suit in the court I did not make any efforts in writing to trace out those documents dated 30.07.1956 and 18.07.1957. In the year 1985-86 I came to know that these documents dated 30.07.1956 and 18.07.1957 are loss. These fact came to my notice for the first time during that period. It is true that I had not produced on record any document to show what were the efforts taken by me to search those document since 1985 till 16.01.2004." Further he admitted that, " I cannot assign any reason why I had not mentioned in this suit about loss of documents concerned though I was knowing about lost in the year 1985-1986 itself."

22. The petitioners-plaintiffs have also laid the evidence of one Shri.S.L.Gaikwad from the office of the Sub Registrar. The said evidence does not lead the case of the plaintiffs any further. In fact, the Trial Court has commented adversely against the said Shri.S.L.Gaikwad. The said Shri.S.L.Gaikwad has stated in his evidence

that he has not come across any record pursuant to the application of the original plaintiff Shri.Yashwant Chondhe for search of the documents. He has further stated that there is an inward number given to the letters/documents received and the documents despatched bear an outward number. The application dated 10.01.2004 of the plaintiffs forwarded to him by the Sub Registrar Office does not bear any inward number. The Trial Court in the said circumstances has stated that the attempt of the plaintiffs in getting the said Shri.S.L.Gaikwad to depose is an after thought and that the evidence given by him is a got up evidence somehow to support the plaintiffs.

23. It is to be borne in mind that the documents i.e. certified copies are sought to be relied upon are dated 30.07.1956 and 18.07.1957. The original plaintiff is not a signatory to the alleged documents. From the evidence adduced, it

also becomes clear that even the plaintiff No.1(a) has not seen the documents personally, as also the persons alleged to have signed the documents are not alive any more as per the records before the Trial Court. In the said circumstances, the laying of a conclusive foundation for allowing the said documents to be exhibited and thereby allowing the plaintiffs to lead secondary evidence becomes of crucial importance.

24. From the evidence adduced before the Trial Court by the plaintiffs, it becomes clear that the original plaintiff Shri.Yashwant Chondhe never took search of the documents in his lifetime, as also the heirs of the said Yashwant Chondhe, who are now prosecuting the said suit on behalf of the original plaintiff. The said facts have also come in the evidence of Shri.Gaikwad. No steps have also been taken with the postal authorities. Therefore, the case of the

plaintiffs of the loss of the said documents which have been allegedly executed between a gap of one year of each other i.e. 30.07.1956 and 18.07.1957 in the same manner does not inspire confidence. More so, when the contesting defendants are seriously disputing the existence of the said documents, in my view, therefore, the Trial Court has rightly come to a conclusion that the plaintiffs have failed to lay a foundation for leading secondary evidence. Taking an overall view of the matter, the reasoning of the Trial Court that there is no compliance of Section 65(c) of the Evidence Act. cannot be faulted with. The petitioners-plaintiffs have failed to make out a case for leading secondary evidence in terms of the parameters laid down by the Apex Court as well as in terms of the law laid down by the judgements cited (supra) by Shri.V.B.Naik, learned counsel for the respondents.

25. In that view of the matter, no case for interference with the impugned order dated 22.7.2004 is made out. The petition is, therefore, dismissed and rule discharged. The parties to bear their respective costs.

Sd/-

(R.M. SAVANT, J.)